Filed 6/10/19 In re W.M. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re W.M., a Person Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R.B., Defendant and Appellant.	E071872 (Super.Ct.No. J272237) OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Affirmed.

Neale B. Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, and Jodi L. Doucette, Special Counsel, for Plaintiff and Respondent.

R.B. (Mother) filed a petition under Welfare and Institutions Code section 388[1] seeking to have custody of her minor son returned to her after reunification services were terminated. The trial court denied the petition, and Mother argues that the denial is not supported by substantial evidence. We affirm.

BACKGROUND

A. *CFS Investigation and Removal*

The minor was born in August 2017, when Mother was 19 years old. He was Mother's first child. In the days that Mother and the minor were hospitalized after his birth, San Bernardino County Children and Family Services (CFS) received two referrals, alleging that (1) Mother did not appear mentally capable of caring for the minor because of Mother's autism and other mental health issues, (2) Mother did not appear prepared to care for the minor posthospitalization, and (3) Mother was not responding to the minor's needs while in the hospital. It was alleged that Mother did not tend to the minor when he was crying in a bassinet in her hospital room, so a nurse had to feed the minor and change his diaper. Because Mother "did not stir when prompted" when the minor was "screaming and crying," the minor's doctor "ordered a monitor to sit in the room 24/7" to ensure the minor's safety.

In an interview with a social worker while at the hospital, Mother admitted that she was "unsure how she [would] provide for the baby but [felt] that she [could] 'figure it out' with" the help of William, an older male friend. She confirmed that she was autistic

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1 All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

and had other mental health issues, including bipolar disorder, for which she admitted that she was not taking any medication because it made her "feel weird." In an interview with a social worker later that month, Mother confirmed the bipolar diagnosis and newly reported that she also had been diagnosed four years earlier with borderline personality disorder but was not prescribed medication or advised to seek therapy.

According to the detention report, Mother received social security survivor benefits of less than $400 per month, had her food stamps discontinued in July 2017, and reported in July 2017 that she was homeless and moving to Sacramento. Mother confirmed that she lived off of social security benefits and also sold antiques from her house when she needed additional money. Starting in March or May of 2017, Mother also started living with and receiving assistance from William, who also supported himself with social security benefits. Mother identified someone named E.N. as the biological father. His whereabouts are unknown, and he has never appeared in this case.

Mother and the minor were scheduled to be discharged from the hospital on August 8, 2017, when the minor was four days old. Before they were released, CFS secured a warrant, detained the minor, and placed him in foster care. A juvenile dependency petition was filed on August 10, 2017, in which CFS alleged that the minor was at risk of abuse, neglect, and/or harm as defined under subdivision (b)(1) of section 300 as a result of Mother's inability to properly care for him because of Mother's undiagnosed and untreated mental health issues and because of her unstable and unsafe

lifestyle. CFS further alleged under subdivision (g) of section 300 that E.N.'s whereabouts were unknown and that his ability to care for the minor was unknown.[2]

A social worker visited Mother's home on August 31, 2017. There was a used trailer parked in the front yard that was intended to be the living space for Mother, but it needed repairs. Among other things, the trailer did not have running water, was not connected to sewage hoses, and needed a new battery. Mother in the meantime was living in a single room in the house with William. While Mother thought that the house was in perfect condition for the minor to live in, William thought that neither the house nor the room was suitable for a child to live in. He was "working on it."

B. *Jurisdiction and Disposition Hearing*

At the September 1, 2017, jurisdiction and disposition hearing, the court found true the jurisdictional allegations under subdivisions (b)(1) and (g) of section 300 as to Mother and E.N. The court found that E.N. was the alleged father.[3] Mother was ordered to undergo a psychological evaluation. The court ordered reunification services for Mother but not for E.N. because he was alleged only. Mother was allowed twice weekly supervised visits with the minor.

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[2] CFS also included allegations under subdivision (b)(1) of section 300 as to William, but those allegations were later dismissed.

[3] William signed a voluntary declaration of paternity and the minor's birth certificate at the hospital. Mother admitted to the social worker that he was not in fact the biological father. The court "vacate[d]" the voluntary declaration of paternity William signed and dismissed the allegations against him.

Mother's attorney requested that an emergency assessment be conducted of the home of Mr. and Mrs. V. Mrs. V. was a nonrelative extended family member who lived six hours away in Alameda County. Mrs. V. was present at the jurisdiction/disposition hearing, and Mother's attorney represented that Mrs. V. was willing to bring the minor to San Bernardino County for visits. Approximately one week after the hearing, when the minor was five weeks old, the minor was placed in the home of Mrs. V.

C. *Reunification Period*

As promised, Mrs. V. travelled with the minor at first weekly and then monthly (pursuant to a revised court order) to San Bernardino for Mother's visits and rented a hotel room to facilitate the visits. Mother frequently cut the visits short and cancelled visits. Of 13 scheduled visits in the first six months, Mother cancelled two and stayed for less than the full allotment of time for seven.

Mother did not visit with the minor at all between January 4, 2018, and May 10, 2018. At some point in the first half of 2018, Mother moved to Kansas with William. After moving, Mother visited with the minor once in May 2018 and once in June 2018, for a total of 16 hours. William expressed concern to the social worker about Mother traveling to California for visits based on her inability to care for herself. Mother continued to cancel scheduled visits and failed to maintain regular contact with Mrs. V.

When Mother visited with the minor, she "hardly engage[d] with him" and did not appear to know how. Mother did not appear to understand how to properly care for the minor. She consistently did not change the minor's diapers at appropriate intervals, waiting too long between changes, and did not feed the minor enough food or at

appropriate intervals. She also did not prepare the minor's bottles hygienically or according to instructions. The minor tolerated visits with Mother, but he was neither bonded with her nor attached to her.

Although Mother completed parenting classes, attended individual therapy sessions, and received a psychological examination, CFS did not believe that Mother benefitted from those services. The psychologist who evaluated Mother in October 2017 opined that Mother did "not have the capacity to safely and effectively care for her child at this time" and warned that "[t]he risk of harm or abuse to the child would be great if the child was to be left in her care without any outside support." The psychologist recommended that Mother continue therapy and be evaluated by a psychiatrist for a possible psychotropic medication prescription. Despite CFS's attempts to connect Mother with a psychiatrist, she was not examined by one until July 2018.

Mrs. V. and the minor appeared to have a strong bond. The minor was described as a happy baby who was doing "very well" with Mr. and Mrs. V.

At the twelve-month status review hearing on July 27, 2018, the court adopted the findings and orders of CFS, terminated services to Mother, and scheduled a hearing to select and implement a permanent plan (section 366.26 hearing).

D. *Section 388 Petition and Denial*

On December 13, 2018, a week before the section 366.26 hearing, Mother filed a petition under section 388 requesting that custody of the minor be returned to her. Mother claimed that she had completed a parenting class, was working, had secured stable housing, and had plans to attend Job Corps (though she had not applied). Mother

further reported that she was seeking help for her mental health condition, had been attending therapy regularly for the past six months, and had been "medication compliant." In support of the petition, Mother filed exhibits showing that she completed parenting classes, attended therapy before June 27, 2018 and was prescribed medication by a psychiatrist on August 1, 2018. The manager of an RV and mobile home park authored a letter dated November 15, 2018, in which the manager stated that Mother had lived at the park since August 2018, paid her bills on time, and maintained the inside of her home nicely. A pastor from a local church in Kansas opined that he thought Mother would make a "fine" parent. Mother also attached a printout of the services offered by Flint Hills Job Corps.

The court denied the section 388 petition without holding an evidentiary hearing. The order states that the court denied the petition because Mother did not demonstrate a change of circumstances and the proposed change did not promote the best interests of the minor. The order also notes that the minor "was removed at birth and placed in the concurrent planning home at 1 month old."

E. *Subsequent Proceedings*

At the section 366.26 hearing on December 20, 2018, Mother requested that the court not terminate her parental rights and instead adopt a less restrictive plan, such as guardianship. Noting that the minor had been removed at birth, that Mother had never parented the minor, that there existed no parental bond, and that termination of parental rights would not be detrimental to the minor, the court concluded that adoption was in the minor's best interests and terminated the parental rights of both Mother and E.N.

Mother filed a notice of appeal on December 20, 2018, seeking review of the termination of her parental rights. Mother did not explicitly include the denial of the section 388 petition in her notice of appeal.

DISCUSSION

Although Mother appealed from the termination of her parental rights, the only contentions she raises on appeal pertain to the denial of her section 388 petition. At Mother's request, we liberally construe the notice of appeal as including the denial of her section 388 petition and address her arguments on the merits. Mother contends that the trial court erred by denying the section 388 petition without holding a hearing, because she sufficiently pleaded that her circumstances had changed and that it would be in the minor's best interest to be returned to her. We disagree.

A. *Notice of Appeal*

Mother asks that we liberally construe her notice of appeal to apply to the summary denial of her section 388 petition. CFS argues that Mother has forfeited the right to appeal from the denial of the section 388 petition because, as they correctly point out, the notice of appeal does not mention the section 388 petition. We conclude that the notice of appeal was ambiguous and construe it liberally to apply to the denial of the section 388 petition.

An order denying a section 388 petition is an appealable order. (*Nahid H. v. Superior Court* (1997) 53 Cal.App.4th 1051, 1068.) A "notice of appeal must be liberally construed" and will be considered "sufficient if it identifies the particular judgment or order being appealed." (Cal. Rules of Court, rule 8.100(a)(2).) When a notice of appeal

is ambiguous, the law favors a finding of appealability (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 47; *In re Josiah S.* (2002) 102 Cal.App.4th 403, 418), particularly if the notice of appeal is timely as to the omitted order (*In re Madison W.* (2006) 141 Cal.App.4th 1447, 1450 (*Madison W.*)).

Here, the notice of appeal was timely as to the denial of the section 388 petition. The section 388 petition was denied on December 13, 2018, and the section 366.26 hearing was held on December 20, 2018. The notice of appeal was filed the same day as the section 366.26 hearing. Had the notice of appeal expressly included the denial of the section 388 petition, it would have been filed well within the 60-day limit. (Cal. Rules of Court, rule 8.406(a)(1); *Madison W.*, *supra*, 141 Cal.App.4th at p. 1450.)

The notice of appeal indicates that Mother was confused about how to complete the Judicial Council form. The intended subject of Mother's appeal is consequently not clear. First, although Mother had been represented by counsel in the juvenile court proceedings (as she is on appeal), she indicated otherwise on the notice of appeal form and filed the notice of appeal herself.[4] Second, Mother checked the boxes indicating that she was appealing as both the mother and the father. Third, Mother seems to have attempted to appeal from orders that were not applicable at this stage of her case. The notice of appeal form filed by Mother contains a section with a list of specifically appealable orders and judgments with directions to the appellant to "check all that apply."

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4 At the section 366.26 hearing, Mother made a statement (but did not testify) and requested to proceed in pro per or to have William represent her. Those requests were denied.

Mother checked two boxes: (1) the box for "[r]emoval of custody from parent or guardian" under "Section 360 (declaration of dependency)"; and (2) the box for "[t]ermination of parental rights," "[a]ppointment of guardian," and "[p]lanned permanent living arrangement" under section 366.26. In addition, the form bears a handwritten question mark next to the box for "[s]ection 366.28 (order designating a specific placement after termination of parental rights in which a petition for extraordinary writ review that substantively addressed the specific issues to be challenged was timely filed and summarily denied or otherwise not decided on the merits)." Neither section 360 nor section 366.28 is relevant here. In addition, the notice of appeal form does not contain a separate box to check for section 388 orders. It does contain a catchall box for "[o]ther appealable orders relating to dependency," which Mother did not check. Moreover, although the form prompted Mother to provide the dates of the hearings at which the orders from which she was appealing were entered, Mother did not provide any dates.

Given Mother's attempt to appeal from irrelevant or nonexistent orders, her apparent attempt to appeal from more than just the section 366.26 determination, her failure to include the dates of the hearings on the appeal form that she filled out herself, and the form's failure to identify an order on a section 388 petition as one of her options, it is not clear whether Mother thought she was actually appealing from the section 388 denial. Under these circumstances, we conclude that the notice of appeal is ambiguous as to whether Mother intended to appeal from the order denying her section 388 petition. We thus liberally construe the notice of appeal to apply to the order on that petition.

Because the notice of appeal is timely as to that order, we have jurisdiction to consider Mother's appeal.

B. *Not an Abuse of Discretion to Summarily Deny Mother's Section 388 Petition*

Section 388 allows the parent of a dependent child to petition the juvenile court for a hearing to modify an earlier order. (§ 388, subd. (a)(1).) "A section 388 petition must show a change of circumstances and that modification of the prior order would be in the best interests of the minor child." (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223.) The court may deny a section 388 petition without holding an evidentiary hearing if the petitioner fails to make a prima facie showing of either factor. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189; Cal. Rules of Court, rule 5.570(d)(1).) Conclusory allegations are not sufficient to make a prima facie showing. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) "A 'prima facie' showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited." (*Ibid.*) In determining whether a prima facie showing has been made, "the court may consider the entire factual and procedural history of the case." (*In re K.L.* (2016) 248 Cal.App.4th 52, 62.)

After reunification services are terminated, the focus in dependency proceedings shifts from family reunification to the child's need for permanency and stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*).) A court entertaining a section 388 petition at this stage in the proceeding "must recognize this shift of focus in determining the ultimate question before it, that is, the best interest of the child." (*Ibid.*)

We review the summary denial of a section 388 petition for abuse of discretion. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.) "Under this standard of review, we will not disturb the decision of the trial court unless the trial court exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination." (*Ibid.*; *Stephanie M.*, *supra*, 7 Cal.4th at p. 318.)

Mother contends that she made the requisite showing that returning the minor to her care would be in the minor's best interests. We disagree. Mother's petition contained only conclusory allegations on this point and no supporting evidence. Asked how returning the minor to her care would be in the minor's best interest, Mother stated that the minor "belong[ed] with his biological mother" and that she "love[d] [her] son very much and [she could] provide for him in a safe and protective manner."

Mother urges us to consider that the circumstances that led to the minor being removed from her care were not too severe in that she did not actually abuse him and that CFS never tested whether the minor could be safe in her custody. In support of her reliance on these factors, Mother looks to the nonexhaustive list of best interest factors set forth *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532: "'(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been.'" While focusing exclusively on these factors ignores the mandatory shift in focus at this stage of the proceedings away from family reunification (*In re J.C.* (2014) 226 Cal.App.4th 503, 527), even applying

these factors Mother did not make a prima facie showing that returning the minor to her would be in the minor's best interests. The minor was removed from Mother's custody because Mother demonstrated that she was incapable of safely caring for him. She failed to respond to his basic needs in the hospital after he was born and continued to demonstrate during visits that she could not properly and safely care for him. For example, her failure to follow simple instructions about feeding the minor during visits caused him to be underfed. Consequently, Mother was never able to visit with the minor alone. The record contains no evidence that Mother would be able to safely care for the minor if he were returned to Mother's custody or that it would benefit the minor to be returned to Mother, given that she could not provide minimal care for him during the few supervised visits she enjoyed with him.

Moreover, Mother even acknowledges on appeal that she is not ready to parent the minor by herself but contends that she should be allowed to parent the minor with others' assistance. She provides no evidence that adequate or around-the-clock assistance is available. She thus again provides no evidence that the minor can be safely returned to her care.

Furthermore, Mother did not allege, let alone present any supporting evidence, that the minor's placement with Mrs. V. was inadequate. There was extensive evidence to the contrary that the minor was thriving in the home of Mr. and Mrs. V. and that the minor was bonded with them. Mother and the minor, on the other hand, did not share any bond. Ignoring the minor's bond with his foster family entirely and how removal from that family would affect the minor, Mother contends that she was unable to bond with the

minor because he was removed at birth. But Mother could have developed a bond with the minor if she had not repeatedly missed or shortened visits and then moved to Kansas before reunification services were terminated. In any event, regardless of where the blame lies, the fact remains that the minor is strongly bonded to Mrs. V. but has no bond at all to Mother, so there is no prima facie showing that returning the minor to Mother's custody would be in his best interests.

In sum, considering the allegations in the section 388 petition, the evidence presented in support of the petition, and the history of the entire dependency proceeding, we conclude that the trial court did not abuse its discretion in summarily denying Mother's section 388 petition. Mother did not make a prima facie showing that returning the minor to Mother would be in the minor's best interest. Because we conclude that Mother did not make the requisite showing as to the minor's best interests, we need not and do not address Mother's argument that she sufficiently demonstrated changed circumstances to warrant an evidentiary hearing on her section 388 petition. (*In re Aaron R.* (2005) 130 Cal.App.4th 697, 706; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 808.)

DISPOSITION

The December 13, 2018, order denying Mother's section 388 petition is affirmed.

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MENETREZ
J.

We concur:

RAMIREZ
P. J.

RAPHAEL
J.